**SUPERIOR COURT OF CALIFORNIA,**

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - March 21, 2013

EVENT DATE: 03/22/2013 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2013-00036019-CU-WM-CTL

CASE TITLE: SAN DIEGO TOURISM MARKETING DISTRICT CORPORATION V ROBERT EARL FILNER [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

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**Tentative Rulings on 1) Petition for Writ of Mandate and 2) Motion for Leave to Intervene**

March 22, 2013, 1:30 p.m., Dept. 72

*San Diego Tourism Marketing District v. Filner*, Case No. 2013-036019

**1. <u>Overview and Procedural Posture</u>.**

This case involves unfinished business and a change of administrations in the executive branch, and is not without historical parallels. In the election of 1800, John Adams was defeated in his bid for re-election by his rival, Thomas Jefferson. Before ratification of the 20th Amendment in 1933, the newly elected president did not take office until the following March 4. The intervening months following Adams' electoral loss were filled with political intrigue and backbiting between the Federalists and the Republicans. In the days leading up to Jefferson's inauguration, Adams and his Secretary of State (and incoming Chief Justice), John Marshall, worked feverishly to nominate and have the Senate confirm numerous "midnight" judges and justices of the peace. One such proposed justice of the peace was William Marbury.

Marbury's commission was signed by Adams on the evening of March 3, 1801, and transmitted to the State Department to be countersigned by Marshall and delivered to Marbury. In the confusion associated with the end of one administration and the beginning of another, Marbury's commission, although fully signed and sealed, remained on a table in the offices then used by the Department of State until it was discovered (with several other commissions) by the newly inaugurated president on March 5. Jefferson "forbade their delivery." Later that year, Marbury and the other would-be office holders, having been "credibly advised" that they had been appointed but their commissions not delivered, sought a writ of mandamus compelling the new Secretary of State, James Madison, to deliver the commissions. And thus came to pass the "Great Decision," *Marbury v. Madison,* 5 U. S. (1 Cranch) 137 (1803).

In this case, the San Diego City Council adopted, on November 26, 2012, by a 6-1 vote, a Resolution to authorize an agreement between the City and the petitioner to deliver the collective marketing services for the lodging industry which the Tourism Marketing District (TMD) was created to fund. Then-Mayor Jerry Sanders signed the Resolution the next day. However, a proposed underlying contract remained unsigned and undelivered as Mayor Sanders' term of office expired and Mayor Filner was sworn in on

December 3, 2012.

After unsuccessfully demanding delivery of a signed agreement from Mayor Filner, petitioner filed this mandamus action on February 22, 2013. The verified petition seeks two species of relief: 1) that the court order Mayor Filner to sign and deliver the contract contemplated by the previous City Council's Resolution; and 2) that the court order Mayor Filner to "implement the contract without further delay."

The parties first appeared before the court on March 5, 2013. Petitioner sought an expedited hearing on the writ, arguing that if the matter were not decided by the end of March, the TMD would be forced to cease operation (to the detriment of San Diego's hospitality industry and the many jobs it supports). ROA 7-10. Proposed intervenor SDOG, which is challenging the subject City Council Resolution in another case pending before another judge, sought leave to immediately intervene. ROA 14. Over the current Mayor's vigorous opposition (ROA 20), the court granted the request for an order shortening time and deferred SDOG's request until the merits hearing. ROA 23. The court set a briefing schedule, to which the parties have adhered. The court has reviewed all the briefs and other supporting/opposing papers. The court notes 1) that the City Council has settled with the petitioner; and 2) that the proposed order submitted by the TMD with its March 18 reply papers modifies somewhat the relief sought.

**2. Applicable Standards.**

**A.** In considering this writ application, the central question for the court is (1) whether the Mayor has a clear, present and usually ministerial duty to act; and (2) whether the petitioner has a clear, present and beneficial right to performance of that duty. *State Bd. of Education v. Honig*, 13 Cal. App. 4th 720, 741 (1993). A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety when a given state of facts exists. Discretion, on the other hand, is the power conferred upon public functionaries to act officially according to the dictates of their own judgment. *Transdyn/Cresci JV v. City and County of San Francisco*, 72 Cal. App. 4th746, 752 (1999). Mandamus may not be used to compel a public official to exercise his/her discretion in a particular manner. *Lindell v. Board of Permit Appeals,* 23 Cal. 2d 303, 315 (1943).

**B.** SDOG contends it should be granted leave to intervene pursuant to Code of Civil Procedure section 387, subdivision (a) (permissive intervention). Many cases set forth the standards to be applied by courts in ruling on such intervention requests. *See, e.g., Lindelli v. Town of Anselmo* (2006) 139 Cal.App.4th 1499, 1504 ["A third party may intervene (1) where the proposed intervener has a direct interest, (2) intervention will not enlarge the issues in the litigation, and (3) the reasons for the intervention outweigh any opposition by the present parties. [Citation.]" The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by a judgment. *Id*.

**3. Evidentiary Objections.**

With his March 13 opposition papers, Mayor Filner filed relevance objections to all three of the declarations supporting the moving brief. The objections are overruled.

**4. RFJN.**

The parties' requests for judicial notice of City Council resolutions, enactments and other official records of the City are granted in accordance with Evid. Code section 452. Judicial notice is a limited doctrine; its consequence is to establish a fact as indisputably true, eliminating the need for further proof. (*Sosinsky v. Grant*, 6 Cal.App.4th at p. 1564; see *Post v. Prati* (1979) 90 Cal.App.3d 626, 633; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 [purpose of judicial notice is to expedite production and introduction of otherwise admissible evidence].) Hence, the general rule dictates that a matter is subject to judicial notice only if it is reasonably beyond dispute. (*Fremont Indem. Co. v. Fremont General Corp.*, 148 Cal.App.4th at p. 113; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [matter being judicially noticed must "not [be] reasonably subject to dispute"];

*Post v. Prati*, 90 Cal. App. 3d at p. 633 [" 'The fundamental theory of judicial notice is that the matter that is judicially noticed is one of law or fact that cannot reasonably be disputed' "]; see Jefferson, Cal. Evidence Benchbook (4th ed. 2009) Judicial Notice, § 49.5, p. 1145.)

**5. Rulings.**

**A.** The November 26, 2012 Resolution, which was the only resolution in question when this case was filed and when it was before the court on March 5, is an enactment of the City Council, the legislative branch of the City. The 2012 Resolution is, in essence, a statute. The general rules of statutory construction are (1) to ascertain the intent of the Legislature to effectuate the purpose of the law, (2) to give a provision a reasonable and commonsense interpretation consistent with its apparent purpose, which will result in wise policy rather than mischief or absurdity, (3) to give significance, if possible, to every word or part, and harmonize the parts by considering a particular section in the context of the whole, (4) to take matters such as content, object, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction into account, and (5) to give great weight to consistent administrative construction. *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-18.

The November 26, 2012 Resolution authorized the Mayor or his designee to "enter into **an** agreement with the San Diego Tourism Marketing District Corporation" (**bold** type added). In contrast to the 2008 resolution (which the 2012 Resolution sought to renew), it did not say "**the** TMD agreement" or "the TMD agreement attached hereto." A plain reading of the 2012 Resolution simply does not yield the conclusion that the Council directed the Mayor to enter the specific contract petitioner now claims must be signed; it would have been an easy matter for the drafter of the 2012 Resolution to have said so had this been the intention. The 2012 Resolution "authorized" action; it did not "direct" action. Plainly, the 2012 Resolution granted the Mayor the discretion to determine the final form of agreement between the City and the TMD; the duration of the contract (within a specified maximum of 5 years) being a key term left open by the City Council's action. *Compare Varni Bros. v. Wine World*, 35 Cal. App. 4th 880, 890-91 (1995) (contract without agreed duration terminable at will).

This analysis does not change at the result of the "legislative history" offered by the TMD in the March 18 reply brief (ROA 50). As that brief concedes at 5:9-15, resort to legislative history is only proper if the statute in question is ambiguous. *San Diego v. Haas*, 207 Cal. App. 4th 472, 490-91 (2012). Here, as explained in the paragraph immediately above, there was no ambiguity. Even if the court were to consider the legislative history as evidence of the Council's intention, there is just as much evidence pointing in the other direction. First, it is as least arguable that former Mayor Sanders did not consider the Council's action to have placed him under a mandatory duty to sign the contract that was not attached to the 2012 Resolution. He did not do so, and no party has explained why. The inference is strong that he considered the matter discretionary. Second, if the 2012 Resolution was as clear in imposing a mandatory duty on the Mayor as the TMD now contends, there would be no need for the language in the City/TMD Settlement Agreement quoted in paragraph 5 of the Goldsmith Reply Declaration (ROA 53), and there would be no need for the further legislation referenced in paragraph 9 of the Goldsmith Reply Declaration.

As the prior Mayor did not exercise his discretion to finalize and sign a contract before leaving office, it follows that such discretion was left to his successor. The current Mayor, after the March 5 hearing described in section 1 above and shortly before filing his March 13 opposition papers, transmitted to the TMD a proposed contract which is 1) within the parameters of City Council authorization provided in the 2012 Resolution; and 2) signed by the Mayor. [Burdick Decl. paragraphs 2-3 and Ex. 3.] If the 2012 Resolution were the only legislation at issue as this matter comes to hearing, the court would have no more authority to require more than this than it would to order the TMD to sign the version the Mayor has signed. If the 2012 Resolution were the only legislation at issue as this matter comes to hearing, petitioner would have failed to carry its burden to demonstrate a ministerial duty beyond what the Mayor has already done. Accordingly, there would be no grounds for a writ of mandamus.

However, the 2012 Resolution apparently is not the only legislation at issue as this matter comes to

hearing. In paragraph 9 of his March 18 Declaration (ROA 53), City Attorney Goldsmith stated that the City Council had placed on its March 19 agenda another resolution which would be a complete "game changer." If passed, that resolution would make clear the current Mayor's obligation to forthwith sign the contract which was not signed by Mayor Sanders before he left office. As of the writing of this Tentative Ruling, no party has advised the court whether the resolution attached as Exhibit C to the Goldsmith Declaration was passed by the City Council, and if so, whether it was signed by the Mayor or vetoed by him (and if the latter, whether it has been calendared for consideration of a veto override). Thus, the court finds that it cannot yet make a ruling as to the Mayor's ministerial duty to sign the contract.

Regardless of how the "duty to sign the contract" issue comes out, the court finds that the writ requested by the TMD cannot be granted in the form proposed in the March 18 proposed order. Paragraph 2 of that order provides: "YOU ARE FURTHER COMMANDED to refrain from delaying, obstructing, postponing or otherwise impeding the exercise of any ministerial duty assigned to you or to any employee or officer of the City of San Diego to ensure the complete execution and implementation of the TMD Operating Agreement according to its terms."

The court finds that the moving papers have not established TMD's entitlement to this relief. Once the issue of the duty to sign the contract is resolved, the court is unwilling to assume the current Mayor's intransigence, and any issue of delay or obstruction would have to be the subject of further proof. Moreover, the breadth of the proposed language may involve matters still left to the Mayor's discretion and thereby threaten embroiling the court in the operations of city government (something this court is not eager to do and something which courts in general wisely seek to avoid).

**B.** In view of the court's intention to focus on the narrow question of the Mayor's duty to sign a specific contract, and light of the court's conclusion that SDOG can obtain a full measure of justice on its other challenges to the City Council's Resolution in the litigation now pending before this court's very capable colleague, the court finds that allowing SDOG to intervene in this case would unnecessarily expand the issues in this litigation. Accordingly, leave to intervene is denied.